

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****CRIMINAL APPEAL No. 982 of 2000****For Approval and Signature:****HONOURABLE MR.JUSTICE A.M.KAPADIA****HONOURABLE MR.JUSTICE K.A.PUJ**

|   |                                                                                                                                                     |
|---|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?                                                                              |
| 2 | To be referred to the Reporter or not ?                                                                                                             |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?                                                                                 |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? |
| 5 | Whether it is to be circulated to the civil judge ?                                                                                                 |

**KANUBHAI HAMIRBHAI DHANDHAL - Appellant(s)****Versus****STATE OF GUJARAT - Opponent(s)****Appearance :**

THROUGH JAIL for Appellant(s) : 1,MS BANNA S DUTTA for  
 Appellant(s) : 1,  
 MR KT DAVE, Additional Public Prosecutor for Opponent(s) : 1,

**CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA****and****HONOURABLE MR.JUSTICE K.A.PUJ**

**Date : 21/12/2006**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE K. A. PUJ)**

1. The appellant – original accused No.1 has filed this appeal against the judgment and order of the learned Additional Sessions Judge, Gondal dated 27.9.2000 in Sessions Case No.95 of 2000 (Old Sessions Case No.247 of 1998) convicting the present appellant / original accused No.1 for the offence punishable under Sections-18 and 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter referred to as 'the Act') and sentencing him to suffer R.I for a period of 10 years and fine of Rs.1 lac and in default thereof to undergo S.I for six months.
  
2. The case of the prosecution as revealed in the complaint and as unfolded during the course of trial, is briefly stated as under:-

3. The combing operation was carried out within the limit of Bhadla Police Station of Jasdan Taluka between 12.9.1998 at 11:00 a.m. To 13.9.1998 at 6:00 a.m., as per the direction of District Superintendent of Police (D.S.P.) Rajkot (Rural). P.S.I. Mr.R.S.Zala, in the company of Head Constable – Mr.Juvansinh, Head Constable – Mr.Rambhai, Police Constable - Mr.Jasubhai and Police Constable – Mr.Sejpalsinh, has checked Dahisara Bus Station within the area of Bhadla Police Station on 13.9.1998 at about 2:00 a.m and at that time, P.S.I Mr.R.S.Zala received an information that accused No.1 – Manubhai Hamirbhai was engaged in the illegal business of distilling country made liquor and of selling the same at his residence. On receiving such information, two panchas were called and raid was carried out at about 2:30 a.m on 13.9.1998 by P.S.I – Mr.R.S.Zala. The present appellant – original accused No.1 was found to be present in the residential house

and on interrogation, he was found to be under the influence of alcohol and, therefore, he had been arrested for the offence punishable under Section-66(1)(b) of Bombay Prohibition Act in the presence of panch witnesses at about 2:45 a.m and thereupon, a complaint for the said offence was lodged by P.S.I – Mr.R.S.Zala at about 3:10 a.m in Bhadla Police Station and accordingly, C.R. No.5011/1998 was registered against the present appellant – original accused No.1 – Kanubhai Hamirbhai of village Dahisara in Bhadla Police Station.

4. On the same day, Head Constable – Mr.R.V.Rana of Bhadla Police Station was entrusted the duty of night combing operation in village Kamalpur within the jurisdiction of Bhadla Police Station and accordingly, Head Constable – Mr.R.V. Rana, in the company of Police Constable Mr.Jayendra Narshibhai had visited the village Kamalpur. During the

said night combing operation, they had checked Kamalpur Bus Station at about 2:00 a.m on 13.9.1998 and at that time, they found one person running away on seeing the police staff and, therefore, he was caught by Head Constable – Mr.R.V.Rana and he was interrogated about his presence at Kamalpur Bus Station during the late night hours, but the said accused could not give any satisfactory explanation about his presence. The said person was – Jilubhai Bhanabhai – original accused No.4 in Sessions Case No.95 of 2000. He was arrested for the offence punishable under Section-122(c) of the Bombay Police Act and thereupon Head Constable – Mr.R.V.Rana had lodged a complaint in Bhadla Police Station for the offence punishable under Section-122(c) of the Bombay Police Act, against the said Jilubhai Bhanabhai being CR No.3024 of 1998.

5. It is also the case of the prosecution that

during the course of night combing operation, Arjunbhai Nandram Joshi – the original accused No.3 in Sessions Case No.95 of 2000 was found to have been present at late night hours near Dahisara Bus Station and, therefore, P.S.I. Mr.R.S.Zala interrogated the Arjunbhai Nandram Joshi about his presence, but he could not give any satisfactory explanation about his presence and, therefore, he was arrested at about 3.45 a.m from village Dahisara and thereupon P.S.I - Mr.R.S.Zala had lodged a complaint against him for the offence punishable under Section-122(c) of the Bombay Police Act at about 4.15 a.m in Bhadla Police Station bearing CR No.3025 of 1998.

6. It is also the case of the prosecution that Munnabhai Abdulbhai Path – original accused No.2 in Sessions Case No.95 of 2000 was also found to be present near Dahisara Bus Station at about 3.15 a.m on 13.9.1998 and,

therefore, P.S.I – Mr.R.S.Zala arrested him for the offence punishable under Section-122(c) of the Bombay Police Act and thereupon, lodged a complaint for the said offence in Bhadla Police Station at about 4.00 a.m on 13.9.1998 bearing CR No.3026 of 1998.

7. During the course of inquiry and interrogation of these accused persons, it was found that the original accused No.2 - Munnabhai Abdulbhai Path disclosed the information that he and accused No.3 i.e Arjunbhai Nandram Joshi had gone to village Dahisara to meet the present appellant – original accused No.1 for the purpose of selling opium to the present appellant and they have also sold 1.250 kgs opium to the present appellant and accused No.4 and has received Rs.33,000/- by way of sale proceeds of opium and they have kept the said contraband opium and amount of sale proceeds

in the house of present appellant. On receipt of such information, Assistant Superintendent of Police – Mr. Manoj Sashidhar posted an entry in the station diary of Bhadla Police Station about the information received from the original accused Nos. 2 and 3 at about 14.30 hours and, thereafter, the said information was communicated to J.M.F.C. Jasdan and D.S.P. Rajkot (Rural) by a special messenger and, thereafter, necessary arrangement was made for securing the presence of panch witnesses in Bhadla Police Station and person for weighing the contraband goods and accordingly, two panch witnesses, namely, Bababhai Bhaichandbhai Patel and Subhashbhai Premjibhai Kumbhar had arrived in Bhadla Police Station and service of Nalinkumar Amrutlal Soni was secured for the purpose of weighing the contraband goods which might be found during the search. Preliminary panchnama of the formalities carried out in Bhadla Police Station was

drawn and, thereafter, the raiding party had proceeded in police jeep from Bhadla Police Station towards Dahisara village. On reaching to village Dahisara, Police Jeep was stopped as per the instruction of the present appellant and thereafter, all the four accused, raiding party and two panch witnesses entered in the house. They found one empty wooden cupboard in the room and one suitcase was lying over the said wooden cupboard. The contraband opium and amount of sale proceeds have been kept in the suitcase and, therefore, the said suitcase was opened in the presence of panch witnesses. On opening the said suitcase, black coloured substance wrapped in plastic which was resembling to opium was found from the said suitcase. Mr.Nalinkumar Amrutlal Soni was asked to weigh the said contraband goods and on weighing the said contraband goods it was found to be 1.032 kgs. Out of the said quantity of opium, 10 gram opium was

separated for the purpose of sampling and the said quantity of opium was packed in small plastic bag and signatures of two panch witnesses were obtained on the slip and the said slip was kept in the said small plastic bag and said plastic bag was packed in a cotton bag and, thereafter, again slip bearing the signatures of panch witnesses was pasted over the said cotton bag and it was sealed by sealing wax having the seal of P.S.I. Bhadla. The same procedure was followed with regard to the remaining quantity of opium. Currency notes found were also sealed and attached in the presence of the witnesses. The suitcase was attached. All the four accused were arrested for the offence punishable under Sections-18, 22 and 25 of the N.D.P.S Act at about 18.00 hours on 13.9.1998 and second part of the panchnama was also completed at about 18.00 hours.

8. Mr.Manoj Sashidhar – Assistant

Superintendent of Police has, thereafter, lodged the complaint against all the four accused at Bhadla Police Station for the offence punishable under Sections-18, 22 and 25 of the N.D.P.S Act and accordingly the offence bearing CR No.5012 of 1998 was registered against all the four accused.

9. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded, panchnama of scene of offence was prepared, muddamal articles were recovered by drawing panchnama which were sent to F.S.L. for chemical analysis. After obtaining F.S.L. Report, since sufficient incriminating evidence was found against all the four accused, they were charge-sheeted in the Court of learned Additional Sessions Judge, Gondal. The learned Additional Sessions Judge, Gondal framed charge against the accused for

commission of the offence punishable under Sections 18 and 29 the Act.

10. The charge was read over and explained to the accused. As the accused have not pleaded guilty to the said charge, they were put to trial and tried by the learned Additional Sessions Judge, Gondal in Sessions Case No. 247 of 1998 (New Sessions Case No.95 of 2000).

11. To prove the culpability of the accused, prosecution has in all examined as many as 10 witnesses, details of which are as under:

| Sr. No. | Exh. No. | Particulars                               |
|---------|----------|-------------------------------------------|
| 01.     | 12       | P.W. 1 – Nalinkumar Amrutlal Soni         |
| 02.     | 13       | P.W. 2 – Babubhai Kathabhai               |
| 03.     | 14       | P.W. 3 – Dhirajbhai Kalyanbhai            |
| 04.     | 15       | P.W. 4 – Bababhai Bhaichandbhai           |
| 05.     | 19       | P.W. 5 – A.S.P. Mr.Manoj Sashidhar        |
| 06.     | 30       | P.W. 6 – Head Constable Juvansinh Balubha |

| Sr. No. | Exh. No. | Particulars                                   |
|---------|----------|-----------------------------------------------|
| 07.     | 32       | P.W. 7 – Police Constable Trikamdas Nanalal   |
| 08.     | 33       | P.W. 8 – Head Constable Raisang Babarbhair    |
| 09.     | 43       | P.W. 9 – C.P.I. Mr.Jitendra Bahadursing       |
| 10.     | 45       | P.W. 10 – P.S.I. Mr.Ranjitsing Shivubha Zala. |

12. Prosecution has also produced several documents and relied upon the contents of the same, details of which are as under:

| Sr. No. | Exh. No. | Type of Evidence                                     |
|---------|----------|------------------------------------------------------|
| 01.     | 16       | Panchnama.                                           |
| 02.     | 20       | Complaint.                                           |
| 03.     | 21       | Forwarding letter.                                   |
| 04.     | 22       | Letter to R.F.S.L., Junagadh.                        |
| 05.     | 23       | Resolution U/s.42 of N.D.P.S.Act.                    |
| 06.     | 24       | Report to J.M.F.C, Jasdan and D.S.P. Rajkot (Rural). |
| 07.     | 25       | Station Diary Entry No.12 & No.13 at 14.30 hour.     |
| 08.     | 26       | Station Diary Entry No.14 & No.15.                   |
| 09.     | 27       | Report U/s.58 of Cr.P.C.                             |
| 10.     | 28       | Report to Sessions Court, Rajkot.                    |
| 11.     | 34       | Station Diary Entry No.17.                           |
| 12.     | 35       | Complaint U/s.66(1)(b) against accused No.1.         |
| 13.     | 36       | Station Diary Entry.                                 |
| 14.     | 37       | F.I.R. U/s.122(c) against accused No.4.              |

| Sr. No. | Exh. No. | Type of Evidence                        |
|---------|----------|-----------------------------------------|
| 15.     | 38       | F.I.R. U/s.122(c) against accused No.3. |
| 16.     | 39       | Station Diary Entry.                    |
| 17.     | 40       | F.I.R. U/s.122(c) against accused No.2. |
| 18.     | 41       | Station Diary Entry.                    |
| 19.     | 46       | Panchnama Seizure of vehicle.           |
| 20.     | 47       | Report to J.M.F.C, Jasdan.              |
| 21.     | 48       | Report from R.F.S.L., Junagadh.         |
| 22.     | 49       | Report of R.F.S.L., Junagadh.           |
| 23.     | 50       | Report of R.F.S.L., Junagadh.           |

13. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Gondal, explained all the four accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements, as required under Section 313 of the Code. In their further statements, the accused denied the case of the prosecution by reiterating that they have been falsely implicated.

14. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by

the prosecution, the learned Additional Sessions Judge, Gondal has acquitted original accused Nos.2 to 4. He, however, has held that the prosecution has established beyond reasonable doubt that the charge levelled against the present appellant - original accused No.1 was proved and, therefore, the appellant - original accused No.1 was held guilty of the offence punishable under Sections- 18 and 29 of the Act. Thereafter, the learned Additional Sessions Judge, Gondal heard the original accused No.1 and his advocate on sentence and looking to the gravity of the offence committed by the accused No.1, and looking to the circumstances, the accused No.1 was sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, simple imprisonment of six months for the offence punishable under Sections -18 and 29 of the Act.

15. Ms. Banna S. Dutta, learned advocate appearing for the appellant – original accused No.1 has submitted that the learned Additional Sessions Judge, Gondal has committed an error on the face of the record by convicting the appellant – original accused No.1 for the offence punishable under Section 18 of the Act. The learned Additional Sessions Judge, Gondal has misdirected himself in appreciating the evidence placed on record. The learned Additional Sessions Judge, recorded the findings which are not based on the evidence on record. The learned Sessions Judge should have appreciated the evidence and should have also held that the prosecution has failed to prove the offence against the appellant – original accused No.1 beyond reasonable doubt. The learned Additional Sessions Judge has failed to consider the mandatory provisions of Sections 42, 50, 52, 55 and 57 of the Act. She has further submitted that

the prosecution witnesses have tendered contradictory and unreliable evidence and therefore, no reliance can be placed on their evidence. She has further submitted that the government servant have been selected as panch witnesses of the raid and, therefore, they were not independent witnesses and no reliance can be placed on the evidence of the said witnesses. She has further submitted that the alleged disclosure statement made by two accused and alleged disclosure in pursuance to such statement, are clearly in violation Section-27 of the Evidence Act and, therefore, no reliance can be placed on such disclosure statement. She has further submitted that the alleged statement was made by one of the accused and therefore the said statement could not bind other co-accused and, therefore, other accused could not be held liable on such statement of one of the accused. She has further submitted that the prosecution has miserably failed to prove

that the raided premises was belonging to the present appellant – original accused No.1 and, therefore, conscious possession of the contraband goods and alleged recovery of the same could not be proved by the prosecution. She has further submitted that there were material contradiction about sealing of the contraband article after seizure. The sample was not first accepted by R.F.S.L., Junagadh and, therefore, it creates serious doubt in prosecution version and, therefore, possibility of tampering with the seal cannot be ruled out.

16. She has further submitted that the sealing procedure adopted by the raiding party and / or the investigation agency is very defective and the slip duly signed by the panchas as well as PI were not affixed, as required under law and in accordance with the judgments delivered by this Court.

17. In support of the above submission, Ms. Banna Dutta, the learned advocate of the appellant – original accused No.1 has relied on the decision of this Court in the case of Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409 wherein after considering earlier three decisions of this Court, namely, (i) Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153, (ii) unreported decision dated 17.08.2001 rendered in Criminal Appeal No. 323 of 1996 filed by Jitendra @ Sanjaykumar Suryakant Desai against State of Gujarat and (iii) decision dated 07.05.2002 rendered in Criminal Appeal No. 287 of 1999 filed by Ganpatram Punmaram Vishnoi against State of Gujarat, the Court held that as per the law laid down by this Court, the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with

sample, the slips affixed would get torn. On re-appreciation of evidence, the Court was satisfied that correct and fool-proof procedure of sealing was not resorted to by the Investigating Officer and possibility of tampering with muddamal was not ruled out at all. The Court has evaluated such deficiency in light of other discrepancies brought on record of the case and held that it was difficult to sustain conviction of the appellant – accused. The appeal was accordingly allowed and the appellant – accused was ordered to be released from jail forthwith unless his presence in jail was needed with reference to any other case.

18. Mr. K.T.Dave, the learned Additional Public Prosecutor appearing for State of Gujarat, on the other hand, supported the order and judgment of the learned Additional Sessions Judge, Gondal and submitted that there was no violation of any statutory

provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Sections 42, 52, 55 and 57 of the Act were violated. So far as sealing procedure is concerned, he has submitted that as per the panchnama drawn at the site, proper procedure has been adopted and it cannot be said that sealing procedure conducted by the raiding party was defective.

19. We have considered the submissions advanced by Ms. Banna S. Dutta, learned advocate appearing for the appellant – original accused No.1 and Mr. K.T.Dave, learned Additional Public Prosecutor appearing for State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad

and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Additional Sessions Judge, Gondal, convicting the appellant - original accused No.1.

20. Though several contentions were raised before the Trial Court and before this Court, we confine ourselves to deal with the strong protest lodged against sealing procedure adopted by the prosecution. Even otherwise, we are not impressed by the other contentions raised by Ms. Banna Dutta, the learned advocate of the appellant – original accused No.1. The main grievance was that the identity of the muddamal and the samples sent to the F.S.L. is not established. There was a possibility of tampering with the contents of the samples. The samples were not kept in safe and proper custody and the sealing

procedure was absolutely defective. This contradiction of the evidence in the witnesses with regard to the sealing procedure and the possibility of the tampering of the contents of sample cannot be ruled out.

21. To examine and appreciate the aforesaid contention, relevant provisions in the Act or Rules made thereunder, touching this subject matter are required to be looked into.

22. Section 55 of the Act deals with Police to take charge of articles seized and delivered. It provides that Officer in charge of police station shall allow any officer depositing the seized articles to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station. Except this, no provision seems to have been made in the

present Act and Rules framed thereunder regarding mode of taking and sealing of the sample, mode of assigning the same to chemical examiner and their chemical examination or even touching the above matters. However, the Central Government issued Standing Instruction / Orders. Standing Order No. 1/88 dated 15.03.1988, Standing Order No. 2/88 dated 11.04.1988 and Standing Order No. 1/89 dated 13.06.1989 are required to be looked into. Standing Instruction 1/88 speaks about procedure regarding drawl, storage, testing and disposal of samples from seized narcotic drugs and psychotropic substances. Standing Order No. 2/88 deals with receipt, custody, storage and disposal of seized/confiscated narcotic drugs and psychotropic substances. Standing Order No. 1/89 relates to general procedure for sampling, storage etc. Standing Instruction / Order No. 1/88 inter alia provides as under :-

(i) If the drugs seized are found in packages/containers, the same should be serially numbered for purpose of identification etc.

(ii) Samples must be drawn on the spot of recovery in duplicate, in the presence of search (panch) witnesses and the person from whose possession the drug is recovered.

(iii) The quantity to be drawn in each sample should be 5 gms in respect of all narcotic drugs and psychotropic substances except in the cases of opium, ganja and charas, hashish where a quantity of 24 gms in each case is required. The same quantity should be taken for the duplicate samples also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

(iv) In the case of seizure of a single package/container one sample in duplicate is to be drawn. In case of seizure of more than one packages/container one sample in duplicate from each package/container should be drawn.

(v) All samples must be drawn and sealed in the presence of the accused, panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose possession the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and duplicate of each sample.

(vi) The sample in duplicate should be kept in heat sealed plastic bags. The plastic bags should be kept in a paper envelope and properly sealed. Such sealed envelope should be marked as original and duplicate.

(vii) The samples should be dispatched to the respective laboratories under the cover of a Test Memo which shall be prepared in triplicate in proforma NCB-1.

23. Despite the aforesaid Standing Orders / Instructions, the proper procedures are not being followed by the Investigating Agency and cases have come up before the Court. In the case of Chandrakant Nagindas Modi V/s. State of Gujarat, 1989 (I) FAC 153, this Court has taken the view that the muddamal was not properly sealed and there was all possibility of substituting the substance. Coupled with this, the fact that the muddamal remained with the police for more than two months raises a doubt. The prosecution has, therefore, failed to establish the offence beyond reasonable doubt against the appellant. The Court further held that this

aspect has escaped the notice of the Learned Trial Judge and in view thereof, the Court allowed the appeal and acquitted the appellants.

24. In Criminal Appeal No. 323 of 1996, in the case of Jitendra @ Sanjaykumar Suryakant Desai V/s. State of Gujarat decided on 17.08.2001, the Court has taken the view that the contention regarding laxity in following the procedure relating to sealing of the seized contraband articles has some substance. After considering the evidence of the Investigating Officer and Panch witnesses, the Court has observed that after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and max

seals were applied. There is no dispute that the Seal remains in custody of the police. The possibility of tampering with the muddamal at a later stage and then again resealing the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of sample and sealing in presence of Panch witnesses is to ensure that there is no scope for any mischief in procedure required to be followed. At the time of sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the article seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done in that case, the possibility of tampering cannot be ruled out. Under the circumstances, the Court

held that the procedure followed for sealing in that case cannot be said to be proper and free from any possibility of tempering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused.

25. This Court has again considered this issue in Criminal Appeal No. 287 of 1999 in the case of Ganpatram Punmaram Vishnoi V/s. State of Gujarat decided on 07.05.2002. Additional Public Prosecutor, as an officer of the Court, has pointed out in the case that no proper sealing has been done by the PS0 and, therefore, possibility of tampering with the muddamal cannot be ruled out. The Court took the view in that case that the slip signed by the panchas as well as the PS0, which was kept along with the polyethylene bag is required to be affixed

at the outer portion below the wax seal of the police station. If the police keeps the slip signed by the panchas and the PS0 along with the sample muddamal and affix the seal of the police station at the outer portion of the bag, possibility of tampering the muddamal cannot be ruled out as the official seal always remains with the concerned police station. The Court, therefore, held that it is obligatory on the part of the police to see to it that the slip signed by the panchas as well as the concerned Officer is affixed at the outer portion of the sample bag below the official seal of the police station. This procedure will totally rule out the possibility of any tampering with the sample muddamal. This has not been done in that case and hence, the Court held that the procedure adopted by the PS0 cannot be said to be free from any doubt and the possibility of the tampering also cannot be ruled out. The Court held that in

any case, the benefit must go to the accused.

26. All the aforesaid three judgments have been referred to and relied upon by this Court in its later decision in the case of Navinkumar @ Shambhuprasad @ Bapji Chimanlal Vyas V/s. State of Gujarat, 2006 (1) G.L.H. 409 and held that the slips bearing signatures of the panch-witnesses should be affixed on samples and thereafter seals should be applied so that if any attempt is made to tamper with sample, the slips affixed would get torn.

27. This very Bench has considered this issue regarding sealing procedure in Criminal Appeal no. 1366 of 1999 with Criminal Appeal no.34 of 2000 decided on 21.9.2006, wherein all the previous judgments were referred to and relied upon and the appellant / accused was acquitted on the ground that the sealing

procedure was not properly followed by the prosecution.

28. If we consider the procedure laid down in the aforesaid Standing Instructions / Order as well as the ratio of above referred four different judgments of this Court, in light of the facts found from the deposition of the Panch witnesses, Police witnesses and F.S.L. Report as well as from the documents produced on record, we come to the conclusion that in the present case also, proper procedure for sealing has not been followed by the prosecution.

29. P.W No.1 - Nalinkumar Amrutlal Soni Ex.12 is one of the members of the raiding party. He has gone to Bhadla Police Station with scale and weigh. He has not said anything about the manner of sealing and packing of contraband goods.

30. P.W. No.4 - Bababhai Bhaichandbhai Ex.15 is the panch witness. He has stated about putting a paper slip bearing his signature and signature of another panch witness. He has also identified his signature over the said slip.

31. P.W. No. 6 - Juvansinh Balubha Ex.30 is the Head Constable and one of the member of raiding party. He has not stated anything about the sealing procedure in his deposition.

32. P.W. 9 – C.P.I. Mr.Jitendra Bahadursing Ex.43 has testified in his examination in chief that the contraband article weighing about 1 kg and 32 gram valued about Rs.8,000/- was seized from the house of Kanu Hamir – present appellant and 10 gram were taken there from by way of sample which was

sealed alongwith the slip duly signed by the panch witnesses.

33. P.W. 10 – Mr.Ranjitsing Shivubha Zala Ex.45 has not said anything in detail with regard to sealing procedure. Even from his cross-examination, no further details were found about the sealing procedure.

34. Panchnama of scene of offence drawn at Ex.16 indicates that 10 gram opium were taken and the same were kept in small plastic bag. The bag was packed and slip duly signed by panch witnesses was kept on the said plastic bag. The said plastic bag was kept in another cotton bag and the said cotton bag was stitched with thread and needle and again a slip duly signed by the panch witness was kept in the said cotton bag and it was sealed with wax and seal of Bhadla Police Station was affixed thereon. The same procedure was

followed with regard to the remaining quantity of contraband articles.

35. The learned Additional Sessions Judge, Gondal has discussed the sealing issue in para-46 of the impugned judgment and order. It reads as under :-

“Now, so far as sealing of sample and residue portion of opium is concerned, there is clear evidence of P.W. No.5 A.S.P Mr.Manoj Sashidhar Ex.29 that the sample of opium was separated by weighing with the scale which was brought by P.W. No.1 Nalinkumar Soni Ex.12 and the sample of 10 grams was drawn and it was first wrapped in plastic bag and thereafter, the said plastic bag alongwith slip bearing signatures of panch witnesses were put into cotton bag. The said cotton bag was packed with the help of thread and needle and thereafter, it was sealed with the seal of

P.S.I. Bhadla. Residue opium was also packed and sealed in the same manner. The oral evidence of Writer Head Constable P.W. No.6, Head Constable Juvansinh Balubha Ex.30 shows that the said two sealed packets were handed over to him and thereafter, the sealed sample packet was forwarded to R.F.S.L. Junagadh alongwith forwarding letter Ex.22 signed by A.S.P. Mr.Manoj Sashidhar. P.W. No.7 Constable Trikamdas Nanalal Ex.32 had delivered the same packet to R.F.S.L. Junagadh on 15.9.1998 in sealed condition. Thus, the sealed sample packet had reached to the Laboratory within a period of two days from the raid. The report Ex.15 issued by R.F.S.L. Junagadh clearly reveals that cotton bag was having a seal of P.S.I. Bhadla. The said seals were intact, correct and as per specimen impression. On opening of said cotton bag, it contained a plastic bag having opium and it also

contained a slip bearing signature of two panch witnesses. Thus, it is clearly established that the sample packed had reached to the laboratory in intact condition and it therefore, clearly rules out any remote possibility of tampering with the sample."

36. The learned Additional Sessions Judge, Gondal has, however, failed to appreciate the contradictions found in the evidence of police witnesses, panch witnesses and F.S.L report which raise very serious doubts about the identity of samples and correctness of F.S.L report. F.S.L report at Ex.15 clearly indicates that one sealed cloth parcel contained a plastic bag having semi sealed blacked and brown coloured material said to be opium was received. The said cloth parcel also contained a panch slip bearing the signature of panch witnesses and ASP, Gondal.

From this description found in FSL report, it appears that the slip was loosely kept in the parcel and it was not affixed on the parcel as required under the law. Even there was no reference with regard to two slips duly signed by panch witnesses. Thus, there is major contradiction in the FSL report as well as prosecution witnesses. The sealing procedure adopted is very defective and possibility of tampering cannot be ruled out.

37. Because of the material contradictions between the deposition of the prosecution witnesses regarding sealing procedure and FSL report, this Court is of the view that there is possibility of tampering with the contents of the samples before they were sent to FSL for analysis. When there is possibility of tampering with the contents of the samples, no reliance can be placed on the expert opinion of the report of the FSL and it

cannot be said that the contraband articles were seized from the possession of the accused and the sample there from was taken and that the sample was sent for chemical analysis and that the report of the analysis as expert is regarding the same. When it is so, then the report deserves to be discarded in toto. Standing Instructions issued by the Central Government are violated as it has not come in evidence from the deposition of all the prosecution witnesses that the accused have also signed the slips which were found in the cloth bags containing the samples. In light of these discrepancies, it is very unsafe to sustain the conviction order. The appellant – original accused No.1 is in jail for more than 8 years. It is very unfortunate that the appeal could not be heard earlier.

38. In peculiar facts of the present case and in light of the decisions referred to

herein above and the principles laid down therein, this Court is of the view that the conviction order passed against the appellant – original accused No.1 cannot be sustained. The Appeal, therefore, succeeds. The judgment and order of the learned Additional Sessions Judge, Gondal passed in Sessions case no. 95 of 2000, convicting the appellant – original accused No.1 for the offence punishable under Sections-18 and 29 of the Act and sentencing him to rigorous imprisonment of 10 years and fine of Rs. 1 Lacs and in default thereof, simple imprisonment for six months for commission of such offence is hereby quashed and set aside. The appellant - original accused No.1 is hereby acquitted from the charge levelled against him. The respondent – State of Gujarat and the jail authority is hereby directed to release the appellant – original accused No.1 from jail forthwith unless his presence is required in connection with any

other case. Amount of fine, if paid shall be refunded to him.

39. This Appeal is accordingly allowed.

(A. M. KAPADIA, J.)

(K.A. PUJ, J.)

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